

LEGAL ETHICS OPINION 1445

ZEALOUS REPRESENTATION –  
ATTORNEY AS WITNESS:  
ATTORNEY'S COMPLAINT TO  
DEPARTMENT OF ANIMAL CONTROL  
TO GAIN ADVANTAGE IN A CIVIL  
MATTER.

An attorney (Plaintiff A) and his wife (Plaintiff B) filed an action as pro se plaintiffs against out-of-state Defendant C for breach of contract and fraud with respect to the sale by C to A and B of a reputed stud dog who would not breed. A and B have custody of the dog and seek a refund of the price paid.

Three days prior to the return date for answering the motion for judgment A and B were the subjects of an investigation by law enforcement agency D (Department of Animal Control) based on a complaint that, in a telephone conversation between B and C approximately two months earlier and prior to the initiation of the suit, B had allegedly threatened to harm the dog. A and B have denied threatening the dog's welfare in any way.

During the investigation by agency D, Investigator E informed A that the complaint had been made by telephone by Attorney F who, it is learned, represents C. The investigation determined that the dog was in good health and well cared-for. Immediately after meeting with E, A telephoned F and complained that F had an ethical obligation to have made some independent inquiry or investigation before filing a complaint with agency D. F replied that he had the word of his client, and that was all he needed. No written or telephone inquiry as to the dog's welfare was received from C or F prior to, or since, the investigation. Subsequently, supervisory investigator G of agency D executed an affidavit in which he stated that he received the complaint by telephone from F on the morning of the day of the investigation. The official investigation report of agency D listed F (with address and telephone number) as the complainant and C as the only witness (other than B) to the alleged threat by B.

In the complaint to D, the case was characterized as a custody case for the dog, but the motion for judgment only asked for a refund of the money paid and damages for fraud. The motion for judgment was subsequently amended by A and B to add slander and malicious prosecution, citing the complaint lodged with D and the resulting investigation.

A demand letter was sent on the day of the investigation by F to A and B demanding return of the dog to C, with no mention of a refund or of concern for the dog's welfare. Three days after the investigation, F filed a motion to quash process on behalf of C.

Subsequent to the telephone conversation between A and F, F denied calling D or filing a complaint with D, but admitted receiving the report of the dog's good health from D. In answer to interrogatories, C denied calling D on or about the day of the investigation. In response to interrogatories which inquired into who filed the complaint with D, F

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objected on the basis of attorney-client privilege. It has been indicated that answers to the interrogatories were first served over the signature of F, and that this practice was contrary to Rule 4:8 of the Rules of Procedure. A separate statement signed by C with notarization and not attached to the answers but asserting the truth and accuracy of the answers, was subsequently provided to A and B by F. A and B requested that F provide a complete set of answers, with the notarized signature of C appearing immediately after the last answer, to insure that there was no question that C had reviewed and sworn to all answers.

The Committee has been asked to opine as to several questions regarding the actions of attorney F in the foregoing circumstances. The committee opines as follows:

1. With regard to F's ethical obligation to make an inquiry or investigation of the allegation prior to filing a complaint with agency D, the Committee is of the opinion that an attorney has an ethical responsibility to ascertain that a claim has not been made for the purpose of harassment or malicious injury, is well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law, pursuant to DR:2-107 and DR:7-102. In the circumstances described, therefore, the committee is of the opinion that an attorney has an ethical obligation to investigate a client's claim against an opposing party before filing a complaint with a regulatory agency.

2. With regard to whether and when F must withdraw from representation of C in the suit, the Committee believes that the answer to the question turns on whether it is obvious that F may be called as a witness either for or other than on behalf of his client. Therefore, the Committee is of the opinion that, as required by DR:5-102(A), if the lawyer (F) learns or it is obvious that he ought to be called as a witness on behalf of client (C), he must withdraw from the conduct of the trial. Furthermore, the Committee opines that under the direction of DR:5-102(B), if the lawyer learns or it is obvious that F may be called as a witness other than on behalf of C, F may continue representation of C until it is apparent that F's testimony is or may be prejudicial to C.

3. Whether it is proper or appropriate that A and B bring a motion to disqualify F from further representation of C is beyond the purview of the committee since the committee does not opine or instruct as to the proper course of trial strategy or the conduct of any segment of a case in litigation.

4. The issue regarding whether the attorney-client privilege can be properly asserted by F on behalf of C relative to interrogatories inquiring into the respective roles of F and C in the filing of the complaint with D raises a legal question and is, thus, beyond the purview of the committee. [ DR:2-107(A)(1) and (2), DR:5-102(A) and (B), DR: 7-102(A)(1) and (2); LE Op. 1190.]